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13 Company, LLC, SK Farms Services, LLC, SK Frozen  
14 Foods, LLC, SS Farms, LLC, SSC Farming, LLC, SSC  
15 Farms I, LLC, SSC Farms II, LLC, SSC Farms III, LLC,  
16 SKF Aviation, LLC, and CSSS, LP d/b/a Central Valley  
17 Shippers

18 *Please see continuation page for a complete list of the  
19 moving parties and their respective counsel.*

20  
21 UNITED STATES BANKRUPTCY COURT  
22 EASTERN DISTRICT OF CALIFORNIA  
23 SACRAMENTO DIVISION

24 In re:

25 SK FOODS, LP, a California limited  
26 partnership, et al.,

27  
28 Debtors.

CASE NO.: 09-29162-D-11  
Chapter 11

REQUEST FOR JUDICIAL  
NOTICE IN SUPPORT OF  
DEFENDANTS' SUPPLEMENT  
MOTION TO STAY ADVERSARY  
PROCEEDINGS

Date: June 15, 2011  
Time: 10:00 a.m.  
Courtroom: 34

Adv. Proc. No. 09-02692

DCN: MSS-2

BRADLEY SHARP, et al.,

Plaintiff,

v.

SSC FARMS I, LLC, et al.,

Defendants.

1 BRADLEY SHARP, et al.,

2 Plaintiff,

3 v.

4 SCOTT SALYER, as trustee of the Scott  
5 Salyer Revocable Trust, et al.,

6 Defendants.

7 BRADLEY SHARP, et al.,

8 Plaintiff,

9 v.

10 SCOTT SALYER, in his individual  
11 capacity and as trustee of the Scott Salyer  
12 Revocable Trust, et al.,

13 Defendants.

14 BRADLEY SHARP, et al.,

15 Plaintiff,

16 v.

17 SKF AVIATION, LLC, et al.,

18 Defendants.

19 BRADLEY SHARP, et al.,

20 Plaintiff,

21 v.

22 FRED SALYER IRREVOCABLE  
23 TRUST, et al.,

24 Defendants.

25 BRADLEY SHARP, et al.,

26 Plaintiff,

27 v.

28 CSSS, L.P., et al.,

REQUEST FOR JUDICIAL NOTICE IN SUPPORT  
OF DEFENDANTS' SUPPLEMENT MOTION  
TO STAY ADVERSARY PROCEEDINGS

Adv. Proc. No. 10-02014

DCN: MSS-2

Adv. Proc. No. 10-02015

DCN: MSS-2

Adv. Proc. No. 10-02016

DCN: MSS-2

Adv. Proc. No. 10-02017

DCN: MSS-2

Adv. Proc. No. 09-02543

DCN: MSS-2

**CONTINUATION SHEET: PARTIES  
AND THEIR RESPECTIVE COUNSEL**

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**REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANTS'  
SUPPLEMENT MOTION TO STAY ADVERSARY PROCEEDINGS**

Defendants Scott Salyer individually and as Trustee of the Scott Salyer Revocable Trust, the Scott Salyer Revocable Trust, SK PM Corp., SK Foods, LLC, SKF Canning, LLC, Blackstone Ranch Corporation, Monterey Peninsula Farms, LLC, Salyer Management Company, LLC, SK Farms Services, LLC, SK Frozen Foods, LLC, SS Farms, LLC, SSC Farming, LLC, SSC Farms I, LLC, SSC Farms II, LLC, SSC Farms III, LLC, SKF Aviation, LLC, CSSS, LP d/b/a Central Valley Shippers, the Fred Salyer Irrevocable Trust, and Gerard Rose as Trustee of the Fred Salyer Irrevocable Trust (collectively “Defendants”) hereby request the Court to take judicial notice of the following documents in support of their motion for stay of the following adversary proceedings pending before this Court: (1) Sharp v. Salyer, et al., Adv. P. No. 10-02014; (2) Sharp v. CSSS, L.P., Adv. P. No. 09-02543; (3) Sharp v. SS Farms I, LLC, et al., Adv. P. No. 09-02692; (4) Sharp v. Salyer, et al., Adv. P. No. 10-02015, (5) Sharp v. SKF Aviation, et al., Adv. P. No. 10-02016; and (6) Sharp v. Fred Salyer Irrevocable Trust, Adv. P. No. 10-02017:

Exhibit	Description
A	December 10, 2010 Order on Multiple Appeals from Order Denying Motion for a Stay of Proceedings (“Initial District Court Order”)
B	April 14, 2011 Order on Trustee’s Motion for Rehearing on December 10, 2010 Order Reversing the Denial of a Stay of Proceedings (“Remand Order”)

DATED: April 28, 2011

NAGELEY MEREDITH & MILLER, INC.

/S/ JAMES C. KEOWEN

FELDERSTEIN FITZGERALD  
WILLOUGHBY & PASCUZZI LLP

/S/ PAUL J. PASCUZZI

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SKF Canning, LLC, Blackstone Ranch  
Corporation, Monterey Peninsula Farms,  
LLC, Salyer Management Company, LLC,  
SK Farms Services, LLC, SK Frozen Foods,  
LLC, SS Farms, LLC, SSC Farming, LLC,  
SSC Farms I, LLC, SSC Farms II, LLC, SSC  
Farms III, LLC, SKF Aviation, LLC, and  
CSSS, LP d/b/a Central Valley Shippers

1 SEGAL & KIRBY LLC

2 /S/ MALCOLM S. SEGAL

3 MALCOLM S. SEGAL

4 Counsel for Scott Salyer, individually and as  
trustee of the Scott Salyer Revocable Trust,  
and the Scott Salyer Revocable Trust

LICHTENEGGER LAW OFFICES

/S/ LARRY LICHTENNEGER

LARRY LICHTENNEGER

Counsel for the Fred Salyer Irrevocable Trust  
and Gerard Rose as trustee of the Fred Salyer  
Irrevocable Trust

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A

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

IN RE:

SK FOODS, L.P.

Debtor.

BRADLEY SHARP,

CIV. NO. S-10-1492 LKK

Plaintiff,

V.

SSC FARMS 1, LLC, et al.,

Defendants.

IN RE:

SK FOODS, L.P.

CIV. NO. S-10-1493 LKK

Debtor.

IN RE:

SK FOODS, L.P.

Debtor.

BRADLEY SHARP,

CIV. NO. S-10-1496 LKK

Plaintiff,

V.

CSSS, L.P., et al.,

Defendants.

1 IN RE:  
2 SK FOODS, L.P.  
3 Debtor.  
4 BRADLEY SHARP, CIV. NO. S-10-1497 LKK  
5 Plaintiff,  
6 v.  
7 FRED SALYER IRREVOCABLE  
8 TRUST, et al.,  
9 Defendants.  
/

10 IN RE:  
11 SK FOODS, L.P.  
12 Debtor.  
13 BRADLEY SHARP, CIV. NO. S-10-1498 LKK  
14 Plaintiff,  
15 v.  
16 SKF AVIATION, LLC., et al.,  
17 Defendants.  
/

18 IN RE:  
19 SK FOODS, L.P.  
20 Debtor.  
21 BRADLEY SHARP, CIV. NO. S-10-1499 LKK  
22 Plaintiff,  
23 v.  
24 SCOTT SALYER, et al.,  
25 Defendants.  
/

1 IN RE:

2 SK FOODS, L.P.

3 Debtor.

4 BRADLEY SHARP,

CIV. NO. S-10-1500 LKK

5 Plaintiff,

6 v.

7 SCOTT SALYER, et al.,

O R D E R

8 Defendants.

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10 Before the court are several appeals of an order of the  
11 Bankruptcy Court denying Appellants' motion for a stay of  
12 proceedings pending resolution of a related criminal matter also  
13 before this court, U.S.A. v. Salyer, No. 2:10-cr-00061-LKK. The  
14 Appellee moves to dismiss the appeal on jurisdictional grounds and  
15 opposes the appeal on the merits. For the reasons described below,  
16 the order of the Bankruptcy Court is reversed.

17 **I. BACKGROUND**

18 **A. The Criminal Proceeding**

19 On January 5, 2010, the government filed a sealed complaint  
20 against Frederick Scott Salyer ("Salyer"). An arrest warrant was  
21 issued by a magistrate judge later that day. On February 4,  
22 2010, Federal Bureau of Investigations ("FBI") officers arrested  
23 Salyer. On February 18, 2010, the U.S.A. filed an indictment.

24 On April 29, 2010, the government filed a superseding  
25 indictment. It brings twelve counts and two forfeiture  
26 allegations against Salyer. These include two counts under 18

1 U.S.C. § 1962(c) for conducting and conspiring to conduct the  
2 affairs of an enterprise though a pattern on racketeering  
3 activity, three counts under 18 U.S.C. § 1343 for wire fraud,  
4 one count under 18 U.S.C. § 1519 for destruction, alteration, or  
5 falsification of records in a federal investigation, and five  
6 counts under 15 U.S.C. § 1 for conspiracy in restraint of  
7 trade.<sup>1</sup>

8 With respect to the first count of racketeering, the  
9 government alleges that Salyer was the primary leader of SK  
10 Foods. Superceding Indictment 3. It claims that Salyer was part  
11 of an enterprise that, *inter alia*, "increas[ed] SK Foods'  
12 profits by fraudulently inducing certain of SK Foods' customers  
13 to pay for adulterated and misbranded processed tomato products  
14 by causing the falsification of . . . grading factors and data  
15 contained on the quality control documents that accompanied  
16 customer-bound shipments of processed tomato products that were  
17 produced, purchased, and sold by SK Foods . . . ." Id. at 10.  
18 The U.S.A. alleges that Salyer engaged in these activities from,  
19 approximately, January 1998 through April 2008. Id. at 13. The  
20 government further alleges numerous acts that it claims  
21 constitute a pattern of racketeering activity. These include  
22 several claims of wire and mail fraud relating to the sale of  
23 tomato products to various entities, including creditors in the  
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25 <sup>1</sup> As is almost self evident the court has found the case  
26 complex within the meaning of the Speedy Trial Act, which results  
in the case not subject to the time strictures of the act.

1 instant bankruptcy proceedings, and claims of bribery.

2 In the second count of racketeering, the government claims  
3 that Salyer conspired with persons employed by and associated  
4 with SK Foods to conduct the acts described above during the  
5 same time period. Id. at 39-40.

6 The three counts of wire fraud include communications to  
7 purchasers of SK Foods' tomato product. Id. at 40-49. Each  
8 concerns allegations of bribery of certain employees of the  
9 purchasing companies. These companies include creditors in the  
10 instant bankruptcy proceedings.

11 With respect to the count of destruction, alteration, or  
12 falsification of records in a federal investigation, the  
13 government alleges that Salyer altered and falsified, or caused  
14 others to alter and falsify, the minutes of a December 14, 2007  
15 Board of Directors meeting for the SK Foods Entities. Id. at 51.  
16 It claims that he caused the removal of references to Randy  
17 Rahal as a Director and Officer of SK Foods several months after  
18 Rahal pled guilty to a three count information in this court.  
19 Id. at 50. The factual basis for Rahal's plea indicated that he  
20 served on the SK Foods Board of Directors from 2004 to 2008 and  
21 routinely paid bribes on behalf of SK Foods. Id. at 50-51.

22 The five counts of price fixing concern alleged  
23 conspiratorial activity to fix the price of SK Foods tomato  
24 products for several companies, including creditors in the  
25 instant bankruptcy proceedings. Id. at 52-61.

26 The two forfeiture allegations seek recovery of all real

1 and personal property that constitute or is derived from the  
2 proceeds traceable to the racketeering and wire fraud counts,  
3 which would apparently include property and proceeds otherwise  
4 subject to the bankruptcy proceeding.

5 **B. The Bankruptcy Proceedings**

6 On appeal is an order of the Bankruptcy Court denying  
7 Appellants' motion to stay proceedings in seven adversarial  
8 actions. These include (1) an action to substantively  
9 consolidate various non-debtor SK Foods entities with the SK  
10 Foods estate, No. 10-02014; (2) an action to avoid a fraudulent  
11 transfer of a drum line to CSSS, an Appellant entity, pursuant  
12 to a written contract, No. 09-02543; (3) an action seeking title  
13 to three parcels of real property on the grounds that SK Foods  
14 provided funds for the purchase of the property and was not  
15 repaid, No. 09-02692; (4) a claim of breach of fiduciary duty  
16 against Salyer premised on the allegations in the previous three  
17 actions, No. 10-02015; (5) an action to avoid allegedly  
18 preferential and fraudulent transfers, No. 10-02016; (6) an  
19 action to recover money that was allegedly loaned by SK Foods to  
20 Salyer to pay for a life insurance policy, No 10-02017; and (7)  
21 an action for substantive consolidation of the SK Foods and the  
22 RHM Estates, No. 09-29162. The RHM Estates are not parties to  
23 this appeal.

24 **C. Procedural Posture**

25 On April 28, 2010, Salyer, the Scott Salyer Revocable  
26 Trust, SK PM Corp., SKF Canning, LLC, Blackstone Ranch

1 Corporation, Monterey Peninsula Farms, LLC, Salyer Management  
2 Company, LLC, SK Farms Services, LLC, SK Frozen Foods, LLC, SS  
3 Farms, LLC, SSC Farms I, LLC, SSC Farms II, LLC, SSC Farms III,  
4 LLC, SKF Aviation, LLC, CSSS, LP, Fred Salyer Irrevocable Trust,  
5 and Gerard Rose as Trustee of Fred Salyer Irrevocable Trust  
6 ("Appellants") filed a motion to stay the seven adversary  
7 proceedings discussed above pending resolution of the criminal  
8 proceedings against Salyer. They argued that a stay should be  
9 issued, *inter alia*, to protect Salyer's Fifth Amendment rights  
10 and the due process rights of the other Appellants who, they  
11 contend, require Salyer's testimony to mount a defense to the  
12 adversary proceedings. On May 4, 2010, Appellants filed in the  
13 bankruptcy proceedings a request for judicial notice of the  
14 Superceding Indictment of Salyer, which was filed on April 29,  
15 2010. They did not attempt to amend or revise their motion in  
16 light of the Superceding Indictment.

17 On May 12, 2010, the Official Committee of Unsecured  
18 Creditors filed an opposition to Appellants' motion to stay.<sup>2</sup>  
19 Also on May 12, 2010, Bradley Sharp, the Bankruptcy Trustee  
20 ("Appellee" or "Trustee") filed a response to the motion to  
21 stay. The Trustee argued, *inter alia*, that the indictment and  
22 the adversary proceedings are not based on the same matter or  
23 same or closely related facts, that prosecution of the adversary  
24 proceedings will not impair Salyer's Fifth Amendment rights, and  
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26 <sup>2</sup> Only the Trustee has opposed the instant appeal.

1 that a stay is otherwise not appropriate.

2       On June 1, 2010, the Bankruptcy Court denied Appellants'  
3 motion for a stay. It decided, *inter alia*, that, with one minor  
4 exception, the factual allegations in the adversary proceedings  
5 bear no significant relationship to the allegations in the  
6 indictment. The court continued to balance the so-called Keating  
7 factors, from which it determined that a stay of proceedings was  
8 not proper. See infra Section III.B.1 (discussion of Keating  
9 factors). This order was issued in all of the seven adversarial  
10 proceedings discussed above.

11       On June 16, 2010, Appellants filed notices of appeal of  
12 this order in each of the seven proceedings. On June 17, 2010,  
13 Salyer filed in the criminal action an Emergency Application to  
14 Enjoin and Stay Discovery of the bankruptcy proceedings. On June  
15 18, 2010, the court temporarily stayed discovery in the  
16 bankruptcy proceedings in light of the June 17, 2010 motion. On  
17 August 3, 2010, the court held a hearing on the emergency  
18 application. As a result of the hearing, the court continued the  
19 stay until resolution of the instant appeals.

20       On August 4, 2010, Appellants filed an opening brief. They  
21 argue that, *inter alia*, the criminal indictment and the  
22 adversary proceedings overlap, that the denial of the stay  
23 offends the due process rights of the non-debtor entities, and  
24 that the Bankruptcy Court did not properly apply the Keating  
25 factors. On August 19, 2010, the Trustee filed a brief in  
26 opposition. He contended that the Appellants failed to show that

1 the Bankruptcy Court abused its discretion in denying the stay  
2 of proceedings. Appellants filed a reply on August 3, 2010.

3 The Trustee also filed two motions relating to the appeals.  
4 First, on August 16, 2010, the Trustee filed a motion to dismiss  
5 the appeals on the grounds that the court lacks jurisdiction to  
6 hear them. Second, the Trustee filed a motion to strike a  
7 declaration filed in support of Appellants' brief on the ground  
8 that the evidence was not presented to the Bankruptcy Court. The  
9 court heard oral argument on the appeals and motions on October  
10 12, 2010.

11 **II. STANDARD**

12 The standard of review of bankruptcy court decisions by  
13 district courts is well-established, and uncontested in the  
14 instant action. See Appellants' Opening Brief re: Stay at 4;  
15 Appellants' Opening Brief re: Preliminary Injunction at 2;  
16 Appellee's Opening Brief re: Stay at 2-3. When reviewing  
17 decisions of a bankruptcy court, district courts apply standards  
18 of review applicable to the courts of appeals when reviewing  
19 district court decisions. In re Baroff, 105 F.3d 439, 441 (9th  
20 Cir. 1997); see also In re Fields, No. CIV. S-09-2930 FCD, 2010  
21 WL 3341813, \*2 (E.D. Cal. 2010) ("A district court's standard of  
22 review over a bankruptcy court's decision is identical to the  
23 standard used by circuit courts reviewing district court  
24 decisions.") (citation omitted).

25 The bankruptcy court's conclusions of law are reviewed de  
26 *novo*. In re Sunnymead Shopping Center Co., 178 B.R. 809, 814

1 (9th Cir. 1995) (citing In re Pecan Groves of Arizona, 951 F.2d  
2 242, 244 (9th Cir. 1991)). District courts review the bankruptcy  
3 court's findings of fact for clear error. In re Sunnymeade  
4 Shopping Center Co., 178 B.R. at 814 (citing In re Siriani, 967  
5 F.2d 302, 303-04 (9th Cir. 1992)); see also Fed. R. Bank. P.  
6 8013 ("Findings of fact, whether based on oral or documentary  
7 evidence, shall not be set aside unless clearly erroneous . . .  
8 .")

9 District courts review a "bankruptcy court's choice of  
10 remedies . . . for an abuse of discretion, since it has broad  
11 equitable remedial powers." In re Sunnymeade Shopping Center Co.,  
12 178 B.R. at 814 (citing In re Goldberg, 168 B.R. 382, 284 (9th  
13 Cir. 1994) (other citations omitted.)). The Ninth Circuit has  
14 held that, "Under this standard, 'a reviewing court cannot  
15 reverse unless it has a definite and firm conviction that the  
16 court below committed a clear error of judgment in the  
17 conclusion it reached upon a weighing of the relevant factors."  
18 In re Sunnymeade Shopping Center Co., 178 B.R. at 814 (quoting In  
19 re Goldberg, 168 B.R. at 384). With respect to review of a  
20 denial of a motion to stay, district courts review a bankruptcy  
21 court's "ruling on a party's request to stay proceedings for an  
22 abuse of discretion." Fed. Sav. & Loan Ins. Corp. v. Molinaro,  
23 889 F.2d 899, 902 (9th Cir. 1989) (citing Mediterranean  
24 Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458, 1465 (9th  
25 ////  
26 ////

1 Cir. 1983)).<sup>3</sup>

2 **III. ANALYSIS**

3 **A. Motion to Dismiss**

4 The Trustee moves to dismiss the instant appeal on the  
5 grounds that this court lacks jurisdiction to hear it.<sup>4</sup>  
6 Specifically, the Trustee contends that the order denying the  
7 stay is not a final order and is not appropriate for  
8 interlocutory review. Appellants argue that this court has  
9 jurisdiction because this order is final under the irreparable  
10 injury doctrine and the pragmatic approach to assessing finality  
11 in bankruptcy proceedings. They further argue that the appeal is  
12 properly subject to interlocutory review.

13 Under 28 U.S.C. § 158(a), "district courts . . . have  
14 jurisdiction to hear appeals . . . with leave of the court, from  
15 interlocutory orders and decrees, of bankruptcy judges entered  
16 in cases and proceedings referred to the bankruptcy judges under  
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19 

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<sup>3</sup> It appears to this court quite odd that district courts  
20 review decisions of bankruptcy courts in this manner given that  
21 bankruptcy courts are a subsidiary division of district courts. It  
22 may be that the restricted standards of review are merely a way of  
23 protecting both courts from unnecessary repetition of frivolous  
24 contentions, and that in more serious matters district courts  
should not apply such a deferential review. Nonetheless, this court  
does not consider whether district courts may depart from this  
standard of review in unusual circumstances because all parties  
agree as to the applicable standard and there appears to be no  
support for that position, in any event.

25 <sup>4</sup> The Trustee has also moved to strike a declaration filed in  
26 support of the appeal. The court will consider this motion along  
with its discussion of the merits of the appeal itself.

1 section 157 of this title.<sup>5</sup> Section 157 allows district courts  
2 to refer any or all cases under title 11 to a bankruptcy court.  
3 The district court here so referred the instant matters on  
4 appeal to the bankruptcy court. Accordingly, district courts  
5 have "discretionary appellate jurisdiction over . . .  
6 interlocutory order[s] of a bankruptcy court." In re Kassover,  
7 343 F.3d 91, 94 (2d Cir. 2003); see Matter of Texas Extrusion  
8 Corp., 844 F.2d 1142, 1156 (5th Cir. 1988) (same); In re  
9 Laurent, 149 Fed. Appx. 833, 835 (11th Cir. 2005); see also  
10 Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 441 n.1  
11 (9th Cir. 1983) (interpreting similar language that was part of  
12 28 U.S.C. § 1334(b) prior to 1984 modification).

13 This type of appellate jurisdiction differs significantly  
14 from the jurisdiction granted to Courts of Appeal to hear  
15 appeals of interlocutory orders. See In re Kassover, 343 F.3d at  
16 94; Fondiller, 707 F.2d at 441 n.1. Specifically, the district  
17 court maintains original jurisdiction over bankruptcy  
18 proceedings, and merely refers such proceedings to bankruptcy  
19 courts. In re Combustion Engineering, Inc., 391 F.3d 190, 225  
20 (3d Cir. 2004) (citing 28 U.S.C. §§ 151, 157(a)); 28 U.S.C. §  
21 1334(b) ("[T]he district courts shall have original but not  
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23       <sup>5</sup> The court notes that Appellants did not file a motion for  
24 leave to appeal the denial of their motion for a stay of  
25 proceedings. Under Fed. R. Bank. 8003(c), "If a required motion for  
26 leave to appeal is not filed, but a notice of appeal is timely  
      filed, the district court . . . may consider the notice of appeal  
      as a motion for leave to appeal." The court so considers the notice  
      of appeal in this case.

1 exclusive jurisdiction of all civil proceedings arising under  
2 title 11, or arising in or related to cases under title 11.");  
3 28 U.S.C. § 157 ("Each district court may provide that any or  
4 all cases under title 11 and any or all proceedings arising  
5 under title 11 or arising in or related to a case under title 11  
6 shall be referred to the bankruptcy judges for the district.").  
7 Thus, a district court may decide to hear an interlocutory  
8 appeal of any order of a bankruptcy court subject only to review  
9 by the Court of Appeals for abuse of discretion.

10 In light of this broad authority to hear interlocutory  
11 appeals, the court does not decide whether the order at issue is  
12 final nor does it determine whether it falls within any of the  
13 exceptions briefed by the parties. Rather, the court grants  
14 Appellants leave to appeal the Bankruptcy Court's order on the  
15 grounds that determining whether to stay the proceedings will  
16 significantly effect the nature of the bankruptcy proceedings  
17 and, conceivably, the criminal proceedings pending in this  
18 court. Thus, the Trustee's motion to dismiss is denied.

19 **B. Merits of the Appeal**

20 **1. Standard to Stay Proceedings**

21 Stays of civil proceedings pending the outcome of criminal  
22 proceedings are not ordinarily required by the Constitution.  
23 Keating v. Office of Thrift Supervision, 45 F.3d 322, 324 (9th  
24 Cir. 1995) (citations omitted). The Ninth Circuit has held that,  
25 "[I]n the absence of substantial prejudice to the rights of the  
26 parties involved, [simultaneous] parallel [civil and criminal]

1 proceedings are unobjectionable under our jurisprudence." Id.  
2 (quoting S.E.C. v. Dresser Indust., Inc., 628 F.2d 1368, 1374  
3 (D.C. Cir. 1980)). A court may, however, decide in its  
4 discretion to stay civil proceedings "when the interests of  
5 justice seem [] to require such action." Id. (internal citations  
6 omitted).

7 When deciding whether to stay civil proceedings, courts  
8 should consider "the particular circumstances and competing  
9 interests involved in the case[s]." Id. (quoting Federal Sav. &  
10 Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 902 (9th Cir. 1989)).  
11 The Circuit has instructed the court to consider "the extent to  
12 which the defendant's fifth amendment rights are implicated."  
13 Id. (internal quotation omitted).

14 Additionally, courts "should generally consider the  
15 following factors:

- 16 (1) the interest of the plaintiffs in proceeding  
17 expeditiously with this litigation or any particular  
18 aspect of it, and the potential prejudice to  
19 plaintiffs of a delay;
- 20 (2) the burden which any particular aspect of the  
21 proceedings may impose on defendants;
- 22 (3) the convenience of the court in the management of its  
23 cases, and the efficient use of judicial resources;
- 24 (4) the interests of persons not parties to the civil  
25 litigation; and

26 ////

1 (5) the interest of the public in the pending civil and  
2 criminal litigation."

<sup>3</sup> *Id.* at 324-25 (citing Molinaro, 889 F.2d at 903).

4 The Ninth Circuit has cautioned, however, that, "A  
5 defendant has no absolute right not to be forced to choose  
6 between testifying in a civil matter and asserting his Fifth  
7 Amendment privilege. Not only is it permissible to conduct a  
8 civil proceeding at the same time as a related criminal  
9 proceeding, even if that necessitates invocation of the Fifth  
10 Amendment privilege, but it is even permissible for the trier of  
11 fact to draw adverse inferences from the invocation of the Fifth  
12 Amendment in a civil proceeding." Id. at 326. Despite the  
13 generosity of the standard, it is nonetheless true that  
14 permitting simultaneous proceedings may seriously undermine the  
15 ability of a person presumed innocent to defend himself and may  
16 provide the prosecution with an undue advantage because it will  
17 have access to the evidence tendered in the bankruptcy  
18 proceedings.

## 2. Factual Findings

20 While this court reviews the Bankruptcy Court's decision to  
21 deny the stay on an abuse of discretion standard, it may  
22 nonetheless review the factual findings of the Bankruptcy Court  
23 for clear error. Consequently, if the court finds any of the  
24 Bankruptcy Court's findings of fact to be clearly erroneous, it  
25 may reverse those findings and any order premised on the  
26 findings.

1       In its order denying Appellants' motion for a stay, the  
2 Bankruptcy Court made the following findings of fact:

3       (1) That the adversary proceedings bear no significant  
4                   relationship to the allegations in the superceding  
5                   indictment against Salyer. Memorandum Opinion at 3-6.

6       (2) That the court does not foresee any testimony Salyer  
7                   might give in the adversary proceedings that would  
8                   legitimately be subject to Salyer's Fifth Amendment  
9                   rights. Memorandum Opinion at 5.

10      (3) That the longer the adversary proceedings are delayed,  
11                   the less likely it is that the Trustee will be able to  
12                   recover the assets he seeks because there is a real  
13                   risk that Appellants would dissipate the assets of the  
14                   debtor entities. Memorandum Opinion at 8-9.

15      (4) That the public's interests in ensuring that aggrieved  
16                   persons are made whole as rapidly as possible and in  
17                   the prompt resolution of civil cases far outweighs the  
18                   public's interest in the integrity of criminal cases  
19                   here because the government has not sought to  
20                   intervene in these adversary actions.<sup>6</sup> Memorandum  
21                   Opinion at 10.

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22                   <sup>6</sup> The government has intervened in non-bankruptcy civil  
23                   proceedings relating to U.S.A. v. Salyer, and a stay is in place  
24                   for those cases. See Morning Star Packing Company v. SK Foods LP,  
25                   2:09-cv-00208-MCE (E.D. Cal.); Four In One Company, Inc. v. SK  
26                   Foods, LP, 2:08-cv-03017-MCE (E.D. Cal.). Stays are also in effect  
                 for two other non-bankruptcy civil case. See Brewer v. Salyer,  
                 1:06-cv-01324-AWI-DLB (E.D. Cal.); Morning Star Packing Company v.  
                 SK Foods, Merced County Superior Court Case No. CU 151242.

(5) That the interest of the Trustee and the creditors in a speedy resolution of the adversary proceedings is of prime importance in this case. Memorandum Opinion at 6.

(6) That the joint plan of liquidation proposed by the secured creditors and the unsecured creditors are often fragile and, thus, any delays in the adversary proceedings would "almost certainly be to the detriment of creditors." Memorandum Opinion at 9-10.

10 The court finds that the fifth and sixth findings of fact  
11 are not clearly erroneous. However, the court determines that  
12 the first four findings are clearly erroneous in whole or in  
13 part.

i. Relationship Between Adversary Proceedings and Criminal Indictment, Implication of Fifth Amendment

16 The Bankruptcy Court correctly noted that, "the strongest  
17 case for deferring civil proceedings until after completion of  
18 criminal proceedings is where a party under indictment for a  
19 serious offense is required to defend a civil or administrative  
20 action involving the same matter." Dresser Indust., Inc., 628  
21 F.2d at 1375-76. Specifically, "[t]he noncriminal proceeding, if  
22 not deferred, might undermine the party's Fifth Amendment  
23 privilege against self-incrimination, expand rights of criminal  
24 discovery beyond the limits of Federal Rule of Criminal  
25 Procedure 16(b), expose the basis of the defense to the  
26 prosecution in advance of criminal trial, or otherwise prejudice

1 the case." Id. at 1376. In Dresser, the Court of Appeals  
2 reasoned that, "[t]he case at bar is a far weaker one for  
3 staying the administrative investigation [because no indictment  
4 has been filed and, thus,] no Fifth Amendment privilege  
5 threatened." The Ninth Circuit adopted this reasoning in  
6 Molinaro, where it held that the district court did not abuse  
7 its discretion by deciding that the burden on the defendant's  
8 Fifth Amendment privilege was negligible because no related  
9 criminal indictments were pending against him at the time of its  
10 ruling. 889 F.2d at 903.

11       Ultimately, when considering a motion to stay proceedings,  
12 courts must determine "the extent to which the defendant's fifth  
13 amendment rights are implicated." Id. at 902. Here, the  
14 Bankruptcy Court conducted a technical comparison of the  
15 specific allegations in the criminal indictment and the  
16 adversary proceedings. Accordingly, it "conclude[d] that, with  
17 one minor exception, the factual allegations in the adversary  
18 proceedings bear no significant relationship to the allegations  
19 in the indictment." Memorandum Opinion at 3. The Bankruptcy  
20 Court continued to reject Appellants' contention that the  
21 reference to an enterprise in some of the adversary complaints  
22 is the same enterprise alleged in the criminal proceeding. It  
23 found that the enterprise alleged in the indictment was premised  
24 upon allegations of "mail fraud, wire fraud, and bribery with  
25 respect to the prices charged and quality of product sold to its  
26 customers, whereas the adversary complaints allege inter-company

1 transfers among the Salyer entities themselves, commingling of  
2 assets, common ownership, management, and control, intermingling  
3 of business operations and activities, and so on." Id. at 4.

4 While the Bankruptcy Court may be correct that specific  
5 allegations of the criminal indictment are, for the most part,  
6 distinct from the specific allegations of the adversary  
7 proceedings, its conclusion that these distinctions demonstrate  
8 that Salyer's Fifth Amendment rights are not implicated is  
9 clearly erroneous. As an initial matter, the assets sought in  
10 the criminal forfeiture proceedings overlap to a significant  
11 degree with the assets sought in the adversary proceedings.  
12 Moreover, Salyer's Fifth Amendment rights are implicated any  
13 time that he testifies or responds to discovery requests that  
14 are admissible to prove that he engaged in the conduct alleged  
15 in the indictment. This conduct can exceed the specific  
16 allegations of the indictment. Specifically, under Fed. R. Evid.  
17 404(b), evidence of crimes, wrongs, and acts not alleged in the  
18 indictment, may be used to prove "motive, opportunity, intent,  
19 preparation, plan, knowledge, identity, or absence of mistake or  
20 accident." Under this rule, for example, evidence that Salyer  
21 fraudulently transferred assets might be used to prove that  
22 Salyer intended to commit the fraudulent acts alleged in the  
23 indictment, or had a plan to conceal fraudulently obtained  
24 assets. Indeed the asserted concealment of assets was a  
25 predominant governmental theme relative to bail.

26 Put directly, even though the specific allegations of the

1 indictment and the adversary proceedings may differ, the  
2 bankruptcy litigation seriously implicates Salyer's Fifth  
3 Amendment rights. He has been criminally accused of engaging in  
4 an enterprise though which he allegedly obtained assets, which  
5 the Trustee is now seeking to recover and to prevent fraudulent  
6 transfer of them. Accordingly, the Bankruptcy Court's finding  
7 that the proceedings do not overlap and that Salyer's Fifth  
8 Amendment rights are not implicated in the adversary proceedings  
9 is clearly erroneous.<sup>7</sup>

ii. Risk that Appellants will Dissipate Assets

11 When considering whether the Trustee and creditors would  
12 suffer prejudice if a stay were to issue, the Bankruptcy Court  
13 reasoned as follows:

14 In the present case, the court has already been  
15 sufficiently persuaded of a . . . risk of dissipation  
16 of assets to issue a preliminary injunction against  
17 the defendants in the adversary proceedings, who are  
18 moving parties in this motion, from transferring  
19 assets previously transferred to them by or through  
20 the debtor. The moving parties now argue that the  
injunction would protect the trustee and creditors  
from any risk of further dissipation of assets during  
the pendency of a stay. The court concludes to the  
contrary - the findings and conclusions upon which the  
injunction is based persuade the court that a real  
risk continues to exist.

22       <sup>7</sup> The court notes that the Trustee objects to the declaration  
23 of counsel for Appellants filed in support of the appeal on the  
24 grounds that it was not raised before the Bankruptcy Court. The  
25 Trustee is correct that this court should not consider evidence  
26 that was not before the Bankruptcy Court. Appellants agree that the  
evidence was not presented to the Bankruptcy Court, but rather was  
provided to this court to provide an overview of matters of which  
the Bankruptcy Court was aware. Because this court has not relied  
on the affidavit in reaching its conclusions, the motion to strike  
is granted.

1 Memorandum Opinion at 9. The Bankruptcy Court does not in any  
2 way address why the entrance of the preliminary injunction will  
3 not protect the Trustee and the creditors. Appellants raised  
4 this serious concern before the Bankruptcy Court. Failure to  
5 provide any explanation as to why the preliminary injunction is  
6 insufficient to protect the Trustee and creditors from  
7 dissipation of assets due to debtor conduct is clear error.<sup>8</sup>

### iii. Balance of Public Interests

9       In applying the Keating test, the Bankruptcy Court was  
10      tasked to evaluate the public interest. It explained that while  
11      it recognizes the public's interest in the integrity of criminal  
12      cases, that interest is relatively low in the instant case  
13      because the government has chosen not to intervene in the  
14      adversary proceedings. The court has been unable to find any  
15      case to support the contention that the weight of the public's  
16      interest in the integrity of criminal proceedings is somehow  
17      influenced by the prosecutor's decision to intervene. See, e.g.,  
18      Taylor, Bean & Whitaker Mortg. Corp. v. Triduanum, 2:09-cv-0954-  
19      FCD-EFB, 2009 U.S. Dist. LEXIS 60849, at \*10 (E.D. Cal. Jul. 15,

21       <sup>8</sup> The Bankruptcy Court may have been had in mind the Drum Line  
22 issue. But that itself requires testimony that may involve Salyer's  
23 Fifth Amendment rights. While the court may share some of the same  
24 concern about that single incident, it is, at this stage, unclear  
25 as to whether there was a violation of the temporary restraining  
order and, thus, relying on it seems misplaced in light of the  
26 serious adverse consequences. Furthermore, the parties have  
represented that the only remaining assets are real property and  
money. These assets, unlike the Drum Line, cannot be transferred  
without the approval of the Bankruptcy Court and, thereby, then  
present little or no risk that they will be wrongfully transferred  
while the preliminary injunction is in effect.

1 2009) (Court does not mention intervention by government); James  
2 v. Conte, No. C. 04-5312 SI, 2005 U.S. Dist. LEXIS 46962, \*5  
3 (N.D. Cal. Apr. 19, 2005) (same); Javier H. v. Garcia-Botello,  
4 218 F.R.D. 72, 75-76 (W.D.N.Y 2003), (court simultaneously  
5 granted a stay of proceedings and denied a motion to intervene  
6 by the government). Indeed, it seems misplaced to suggest that  
7 the prosecutor's view demonstrates the public interest in light  
8 of the constitutionally protected right of presumed innocence  
9 and the obligation of proof which falls only on the prosecution.  
10 The Bankruptcy Court has not identified any other reasons why  
11 the public interest in the integrity of this criminal case is  
12 relatively low. This conclusion is also in clear error. There is  
13 no factual basis to support the Bankruptcy Court's conclusion  
14 that the public interest in the integrity of the criminal case  
15 is "far outweighed in this case by the public's countervailing  
16 interests in ensuring that aggrieved persons are made whole as  
17 rapidly as possible . . . and by the public's interest in the  
18 prompt resolution of civil cases." Memorandum Opinion at 10  
19 (citations and internal quotations omitted).<sup>9</sup>

20 **3. Reversal of Bankruptcy Court's Decision**

21 For the reasons discussed above, the court finds that the

22

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23 <sup>9</sup> Appellants also argue that the Bankruptcy Court made an  
24 error of law in its application of the Keating factors.  
25 Specifically, they argue that the court wrongly gave the interests  
26 of the creditors the weight of the interests of plaintiffs. Given  
the court's conclusion that there were factual errors that demand  
reversal, the court need not address the merits of this argument.

1 Bankruptcy Court made several significant erroneous factual  
2 findings in its application of the Keating factors. Based on  
3 these clearly erroneous factual findings, the court determines  
4 that the Bankruptcy Court abused its discretion in denying  
5 Appellants' motion for a stay. The remaining question in this  
6 appeal is, then, what order the court should issue. Remand with  
7 instructions might well be appropriate because this court  
8 reviews for abuse of discretion. However, the court finds that  
9 it should craft an order staying proceedings in part because it  
10 is responsible for the conduct of the criminal trial and is more  
11 familiar with the values informing criminal proceedings.

12       Accordingly, the court orders a stay of all further  
13 bankruptcy proceedings where Appellants make a credible showing  
14 that discovery from or testimony of Scott Salyer or his criminal  
15 counsel is relevant to the proceedings. The court wishes to be  
16 clear, the orders heretofore issued on a preliminary basis are  
17 unaffected by this order.

#### IV. CONCLUSION

19 For the foregoing reasons the court REVERSES the decision  
20 of the Bankruptcy Court denying Appellants motion to stay as  
21 described above.

22 The court FURTHER ORDERS that the Trustee's motion to  
23 dismiss is DENIED and the Trustee's motion to strike is GRANTED.

24 IT IS SO ORDERED.

25 DATED: December 9, 2010.

B

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

IN RE:

SK FOODS, L.P.

Debtor.

BRADLEY SHARP,

CIV. NO. S-10-1492 LKK

Plaintiff,

V.

SSC FARMS 1, LLC, et al.,

Defendants.

IN RE:

SK FOODS, L.P.

CIV. NO. S-10-1493 LKK

Debtor.

IN RE:

SK FOODS, L.P.

Debtor.

BRADLEY SHARP,

Plaintiff,

v.

CSSS, L.P., et al.,

Defendants.

1

1 IN RE:  
2 SK FOODS, L.P.  
3 Debtor.  
4 BRADLEY SHARP, CIV. NO. S-10-1497 LKK  
5 Plaintiff,  
6 v.  
7 FRED SALYER IRREVOCABLE  
8 TRUST, et al.,  
9 Defendants.  
\_\_\_\_\_ /

10 IN RE:  
11 SK FOODS, L.P.  
12 Debtor.  
13 BRADLEY SHARP, CIV. NO. S-10-1498 LKK  
14 Plaintiff,  
15 v.  
16 SKF AVIATION, LLC., et al.,  
17 Defendants.  
\_\_\_\_\_ /

18 IN RE:  
19 SK FOODS, L.P.  
20 Debtor.  
21 BRADLEY SHARP, CIV. NO. S-10-1499 LKK  
22 Plaintiff,  
23 v.  
24 SCOTT SALYER, et al.,  
25 Defendants.  
\_\_\_\_\_ /

1 IN RE:

2 SK FOODS, L.P.

3 Debtor.

4 BRADLEY SHARP, CIV. NO. S-10-1500 LKK

5 Plaintiff,

6 v.

7 SCOTT SALYER, et al.,

O R D E R

8 Defendants.

9

10 Before the court is a motion for rehearing on this court's  
11 December 10, 2010 order reversing the denial of a stay of  
12 proceedings before the Bankruptcy Court, brought by the Bankruptcy  
13 Trustee ("Trustee"). The court resolves the ambiguity in its prior  
14 order below.

15 **I. BACKGROUND**

16 On December 10, 2010, the court reversed a decision of the  
17 bankruptcy court denying a motion to stay adversarial proceedings.<sup>1</sup>  
18 As to remedy, the court ordered "a stay of all further bankruptcy  
19 proceedings where Appellants make a credible showing that discovery  
20 from or testimony of Scott Salyer or his criminal counsel is  
21 relevant to the proceedings. The court wishes to be clear, the  
22 orders heretofore issued on a preliminary basis are unaffected by  
23 this order." Order at 23. The court did not indicate what issues,  
24 if any, were to be remanded to the Bankruptcy Court.

25

26 <sup>1</sup> The court incorporates its December 10, 2010 order.

1       Initially, the court set this motion to be heard on January  
2 31, 2011. On January 25, 2011, however, the Trustee and Appellants  
3 filed a stipulation to continue the hearing to a date no later than  
4 March 31, 2011 so that the parties could engage in mediation. On  
5 January 27, 2011, the court continued the hearing to April 11,  
6 2011. On March 28, 2011, Appellants filed a supplemental objection  
7 to the Trustee's motion. On April 4, 2011, the Trustee filed a  
8 reply brief and the unsecured creditors joined the Trustee's  
9 motion.<sup>2</sup> The motion was heard on April 11, 2011.

## II. ANALYSIS

11 The Trustee has moved for a rehearing on three issues, all  
12 of which concern interpretation of the court's order on remedy.  
13 Specifically, he requests clarification as to whether the  
14 December 10, 2010 order constitutes an entry of a stay in the  
15 bankruptcy proceedings. He further requests that this court  
16 establish a procedure and time frame for the parties to submit  
17 evidence in support of and in opposition to the specific stays.  
18 Additionally, he argues that the court should amend the standard  
19 set forth in the prior order to require a stay where testimony  
20 of Scott Salyer ("Salyer") or his criminal counsel is necessary,  
21 rather than relevant, to the proceedings.<sup>3</sup>

23       <sup>2</sup> The committee of unsecured creditors requests permission to  
24 file a brief as unofficial amicus curiae and for permission to  
appear for oral argument. The court grants this request.

25       <sup>3</sup> The Trustee has also argued, in the alternative, that if the  
26 December 10, 2010 order was to operate as a stay, that it should  
only apply to the adversary proceedings where Salyer is a party.

1       The court acknowledges that its prior order was ambiguous  
2 as to the remedy it issued. Accordingly, the court clarifies<sup>4</sup>  
3 the remedy as follows: The court found that the due process  
4 rights of Appellants may be infringed if they cannot adequately  
5 defend themselves in the adversary proceedings without discovery  
6 from or testimony of Salyer, who cannot be compelled to testify  
7 under the Fifth Amendment, or his criminal counsel, who cannot  
8 be compelled to violate the attorney-client privilege.  
9       Nonetheless, the court recognizes that it is possible for the  
10 adversary proceedings to continue without offending these  
11 rights. Thus, the court is remanding the case to the Bankruptcy  
12 Court to decide, in the first instance, whether discovery from  
13 or testimony of Salyer or his criminal counsel is reasonably  
14 necessary<sup>5</sup> to dispose of a particular matter before the  
15 Bankruptcy Court in the adversary proceedings. A matter is  
16 reasonably necessary if Appellants cannot adequately defend  
17 themselves in an adversary proceeding without evidence from  
18 Salyer or his criminal counsel. The Bankruptcy Court's decisions  
19 on these matters may be directly appealed to this court on the

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20       <sup>4</sup> Appellants challenge this court's jurisdiction to clarify  
21 its prior order. Under Fed. R. Civ. P. 60(a), "the court may  
22 correct . . . a mistake arising from oversight or omission whenever  
23 one is found in a judgment, order, or other part of the record." Under  
24 this rule, the court may amend its prior order to better  
reflect its understanding of the issues and appropriate remedy.

25       <sup>5</sup> Upon further reflection, the court finds that the relevance  
26 standard it previously ordered is too broad. Given the significant  
overlap between testimony in the adversary proceedings and the  
criminal proceedings, discovery from or testimony of Salyer or his  
criminal counsel would almost necessarily be relevant.

1 same grounds that the court had jurisdiction to hear the appeal  
2 of the first order denying a stay of proceedings.

3 Further, Appellants shall file their initial motions to  
4 stay before the Bankruptcy Court within fourteen (14) days of  
5 the issuance of this order.<sup>6</sup> These motions must be set for  
6 hearing as early as practicable under the Bankruptcy Court's  
7 local rules and procedures. The Bankruptcy Court shall issue  
8 written orders explaining the basis for its decisions to stay or  
9 not to stay the proceedings. Additionally, the court recognizes  
10 that an adversary proceeding may not be subject to a stay at  
11 this time, but may, through the course of litigation, require a  
12 stay under the standard set forth above. In this situation,  
13 Appellants shall file a motion to stay proceedings within  
14 fourteen (14) days of their discovery of new evidence or  
15 circumstances, which they contend reasonably requires evidence  
16 from Salyer or his criminal counsel to adequately defend  
17 themselves. This motion must also be set for hearing as early as  
18 practicable. In addition to the burden set forth above,  
19 Appellants must also demonstrate why the new facts or  
20 circumstances that are claimed to exist were not shown at the  
21 time of the initial motion and were only reasonably discovered  
22 within fourteen (14) days of the filing of the motion.  
23 Appellants may not sit on their rights. Failure to bring a

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24  
25       <sup>6</sup> The court assumes that Appellants intend to stay all  
26 adversary proceedings due to their representations at oral  
argument. The court is in no way requiring the Appellants to seek  
such stays.

1 timely motion to stay will result in denial of the motion.

2 Moreover, in his reply, the Trustee attempts to introduce  
3 new evidence in support of his argument that the court amend its  
4 prior order. Specifically, the court concluded that the  
5 Bankruptcy Court's finding that the preliminary injunction will  
6 not protect the Trustee and creditors was in clear error because  
7 the Bankruptcy Court presented no explanation as to why the  
8 preliminary injunction was insufficient to protect those  
9 interests. The Trustee now attempts to seek this court's  
10 consideration of recent events to suggest that the preliminary  
11 injunction may actually be insufficient. This evidence must  
12 first be brought before the Bankruptcy Court in a motion to  
13 amend or lift a stay. If the Trustee decides to bring such a  
14 motion, the losing party may appeal the Bankruptcy Court's order  
15 on the motion to this court, as is customary in this case. At  
16 this time, however, it is not appropriate for the court to  
17 consider this new evidence.<sup>7</sup>

18 IT IS SO ORDERED.

19 DATED: April 13, 2011.

  
LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT

22 <sup>7</sup> The court notes that in its prior order affirming the  
23 Bankruptcy Court's preliminary injunction, the court decided an  
24 issue that was not previously raised before the Bankruptcy Court:  
25 namely, whether counsel for the non-debtor entity-Appellants could  
recover fees. The court only did so pursuant to stipulation of the  
parties and in light of the unique relationship between the  
Bankruptcy and District Courts. No such stipulation exists here  
and, thus, the court declines to decide this question in the  
instant motion.